STATE OF MICHIGAN

COURT OF APPEALS

TAMMY LYNN JACQUES, Next Friend of ASHLEY MICHELLE JACQUES, Minor,

Plaintiff-Appellee,

v

ROBIN EDWARDS,

Defendant-Appellant,

and

OSCODA AREA SCHOOLS,

Defendant.

UNPUBLISHED
March 24, 2015

No. 319643
Iosco Circuit Court
LC No. 12-007194-NI

Before: WILDER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court order which denied its motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) on the issue of gross negligence in this tort action involving the alleged negligence of a government employee. We affirm.

This case involves the injury of Ashley Jacques while she was a passenger on a school bus driven by defendant Robin Edwards. Defendant Edwards had driven many different bus routes for the school over the term of her employment. Relevant to this appeal, defendant had been assigned to the route in issue for one year and one month. The accident occurred when defendant traversed an unmaintained portion of Wentworth Road that was not part of the normal bus route. A videotape of the incident shows that several students had asked defendant Edwards to drive down Wentworth Road, which she agreed to do. Apparently, students liked to travel down this portion of road because it had several dips that would cause them to bounce in the air as they drove.

The bus drove over several dips before hitting one dip that caused the students to bounce quite high out of their seats. At this point, the videotape shows, one student asks defendant Edwards to stop the bus, which she did. Defendant Edwards testified that one student then came to her asking for tissue because he had bitten his lip, and another student asked for a tissue

because Ashley was bleeding. On the video defendant Edwards can be heard saying, "that's why we don't do Wentworth." Defendant Edwards testified that when she dropped off the children, she asked Ashley if she was alright, and she responded that she was.

Defendant Edwards testified she had driven the road two or three times prior with no injuries and that she did not believe an injury would occur on that particular occasion so long as she drove safely. She admitted, however, that it was her instinct that it was not safe and proper to drive a school bus down an unmaintained road. According to defendant Edwards, the previous bus driver to drive that route had told her that she drove Wentworth Road on occasion as a treat for the students and no injury had ever occurred.

Both parties sought summary disposition on the issue of gross negligence. The trial court denied both motions and determined that the issue was best left for a jury to decide. Defendant Edwards argues on appeal that she was entitled to summary disposition.

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Id.* at 120. "In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the party opposing the motion "to establish that a genuine issue of disputed fact exists." *Id*. The court reviewing the motion considers the affidavits, pleadings, depositions, admissions, and other evidence presented in a light most favorable to the non-moving party. *Maiden*, 461 Mich at 120. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*

Section 1407(2) of the Governmental Tort Liability Act, MCL 691.1401 *et seq.*, states as follows:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

"Gross negligence" is defined in the statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden*, 461 Mich at 122-123.

It is insufficient for a plaintiff to simply allege that extra precautions could have been taken. *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). "[W]ith the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result." *Id.* Rather, there must be evidence of "almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Id.* "It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge." *Id.*

In the present case there is no dispute that defendant Edwards drove down the unimproved portion of Wentworth Road, knowing that the children would be bounced from their seats. This fact does not establish gross negligence, however, because knowing that the passengers will bounce is not the same as knowing that bouncing will create a substantial likelihood of injury. Defendant Edwards testified that she did not believe any harm would come if she drove down the road safely. And testimony showed that it was not an uncommon practice to drive down the road, and that no injury such as alleged here had ever occurred in the past. However, defendant Edwards also appeared to make statements on the videotape suggesting that she did have some forewarning that an injury might occur. These statements create a genuine issue of material fact as to whether defendant Edwards's conduct demonstrated a lack of concern for whether an injury would result. Thus, the trial court properly found that summary disposition is inappropriate.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens